IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-JOE-SAJ**
	)	
TYSON FOODS, INC., et al.,	)	
	)	
Defendants.	)	

STATE OF OKLAHOMA'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETERSON FARMS, INC.'S MOTION TO DISMISS AND ALTERNATIVE MOTION TO STAY THE PROCEEDINGS

COMES NOW Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert in his capacity as the Trustee for Natural Resources for the State of Oklahoma under CERCLA ("the State"), by and through counsel, and respectfully submits the following supplemental brief in further opposition to Defendant Peterson Farms, Inc.'s Motion to Dismiss and Alternative Motion to Stay the Proceedings (DKT # 75).[1]

I. Peterson's Motion to Dismiss and Reply are without merit.

A. Preclusion of common law claims.

Peterson Farms, Inc. ("Peterson") does not dispute the State's contention that no authority rebuts the presumption that Oklahoma's common law remedies continue in full force. Instead, Peterson argues that before the State can possibly maintain its common law claims, it must first prove that Peterson has violated the governing statutes and regulations. Reply, p. 3 (DKT #

[1] This Memorandum in Opposition is intended to respond not only to the Peterson Motions / Replies, but also to all of the other Poultry Integrator Defendants which have joined and / or adopted the Peterson Motions / Replies.

147). Relying upon 50 Okla. Stat. § 4, which states that "[n]othing which is done or maintained under the express authority of a statute can be deemed a nuisance," Peterson claims that, in light of the statutes at issue in this case, its conduct at most constitutes a "legalized nuisance." Reply, p. 3. This contention is facially absurd inasmuch as nothing in Oklahoma law "legalizes" the pollution of the IRW by the Poultry Integrator Defendants. Further, Peterson overlooks the fact that the State has alleged it, and the other Poultry Integrator Defendants, have violated the very statutes which they claim allegedly "legalize" their nuisance. See First Amended Complaint (FAC), Count 4 (enforcing, *inter alia*, 27A Okla. Stat. § 2-6-105 and 2 Okla. Stat. § 2-18.1), Count 7 (enforcing 27A Okla. Stat. § 2-6-105, and 2 Okla. Stat. §§ 2-16 and 2-18.1), Count 8 (enforcing 2 Okla. Stat. § 10-9.7 and OAC § 35:17-5-5) and Count 9 (enforcing 2 Okla. Stat. § 9-212 and OAC § 35:17-3-14). No statute expressly (or impliedly) authorizes Peterson, or any of the other Defendant Poultry Integrators, to engage in poultry waste disposal practices that cause pollution of the IRW -- the subject of the State's case. Quite the contrary, the violation of the statutes and regulations at issue in this case constitute public nuisances *per se*. *Branch v. Western Petroleum, Inc.*, 657 P.2d 267, 276 (Utah 1982) (nuisance violating a statute constitutes nuisance *per se* and issue of reasonableness of defendant's conduct and weighing of relative interests of parties is precluded because the Legislature has, in effect, already struck the balance in favor of the innocent party).

Nothing in Peterson's arguments precludes the State's assertion of its common law claims in addition to its various claims based on statutes and regulations. The State is well aware of the interplay between its statutory and common law claims. Its proof will satisfy the requirements of proving both its statutory claims and its common law claims, whether or not those common law claims have been modified by statute. *See Nichols v. Mid-Continent Pipe*

Line Co., 933 P.2d 272, 276 (Okla. 1996). However, the State need not prove its statutory claims before it may assert its common law claims.

B. Constitutional issues: Sovereignty, Due Process, Commerce Clause.

The arguments set forth in Peterson's Reply pertaining to the alleged Constitutional issues -- which mischaracterize many of the State's positions and which misapprehend the applicable law[2] -- raise nothing that has not been previously addressed in the earlier State's responsive pleadings or that is not addressed in its Supplemental Brief in Opposition to Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint which is incorporated herein.

C. Preemption by the Clean Water Act.

The arguments set forth in Peterson's Reply pertaining to the alleged Clean Water Act pre-emption -- which mischaracterize many of the State's positions and which misapprehend the applicable law[3] -- raise nothing that has not been previously addressed in the earlier State's

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[2] By way of example, contrary to Peterson's contention, the State strongly disputes Peterson's assertion that the State's lawsuit violates Arkansas' sovereignty. Such a contention ignores the fact that the State's lawsuit is simply an attempt to hold actors within and without Oklahoma liable for the harm they have caused to Oklahoma. To contend that this amounts to a violation of sovereignty, or amounts to a due process violation, demonstrates a total misapprehension of the applicable law (including *Gore*). *See, e.g., Young v. Masci*, 53 S.Ct. 599, 601 (1933) ("The cases are many in which a person acting outside the state may be held responsible according to the law of the state for injurious consequences within it. Thus liability is commonly imposed under such circumstances for . . . maintenance of a nuisance . . . ." (Citations omitted.)

Also by way of example, Peterson misapprehends commerce clause jurisprudence. The laws under which the State is proceeding plainly apply even-handedly to both Oklahoma and Arkansas polluters. Thus, to the extent a commerce clause analysis is even appropriate, Peterson's challenge fails under the test set forth in *Pike v. Bruce Church, Inc.*, 90 S.Ct. 844 (1970).

[3] By way of example, Peterson simply ignores the plain language of *American Wildlands v. Browner*, 260 F.3d 1192, 1197-98 (10th Cir. 2001) ("In the Act, Congress has chosen not to give the EPA the authority to regulate nonpoint source pollution. . . . [T]he Act nowhere gives the EPA the authority to regulate nonpoint source discharges") and *Defenders of*

responsive pleadings or that is not addressed in its Supplemental Brief in Opposition to Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint which is incorporated herein.

D. The Arkansas River Basin Compact (ARBC) does not pre-empt any of the State's claims.

Peterson mischaracterizes the State's reasoning by claiming the State believes the Compact "is merely a compilation of empty language, directing the respective states to disregard the Compact in favor of litigation over alleged interstate water pollution." Reply, p. 10. The language of the Compact is not empty, but it is limited, and nowhere in the Compact did either the State of Oklahoma or the State of Arkansas give up its sovereign right to protect its public and its environment by seeking redress against polluters in court. Quite the contrary, both states agreed to "[u]tilize the provisions of all federal and state water pollution laws . . . in the resolution of any pollution problems affecting the waters of the Arkansas River Basin." 82 Okla. Stat. § 1421 (art.VII)(E).

Peterson claims that the unambiguous Compact language cited above prohibits a "unilateral lawsuit by one state against the citizens of another," Reply, p. 10, and that the two states can only sue interstate polluters if they together "use federal and state law to accomplish these agreed upon goals." Reply, p. 10-11. Thus, Peterson agrees the states can sue interstate polluters, but only if they do so together. Nothing in the language of the Compact supports this novel suggestion. Given the position asserted by the State of Arkansas before the Supreme Court

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Wildlife v. EPA, 415 F.3d 1121, 1124 (10th Cir. 2005) ("Congress clearly intended the EPA to have a limited, non-rulemaking role in the establishment of water quality standards by states"). Peterson also fails to understand that TMDLs and WQSs do not constitute regulation. *See, e.g., City or Arcadia v. EPA*, 265 F.Supp.2d 1142, 1144-45 (N.D. Cal. 2003). Simply put, the condition precedent for finding federal pre-emption -- namely a mandatory, comprehensive federal regulatory scheme -- does not exist with respect to non-point source pollution.

that everything alleged against the Defendant Poultry Integrators is entirely lawful, giving Arkansas a veto over a suit to protect Oklahoma's water by requiring joint action of the two states against interstate polluters would be tantamount to a guarantee of inaction. Neither the Compact nor common sense supports so bizarre a conclusion.

Despite its claim that the Compact precludes all of the State's claims, Peterson belatedly recognizes that under the Compact each state is responsible for acting against pollution within its own borders. Reply, p. 10, fn. 4. Thus, even under Peterson's theory, the Compact cannot pre-empt Oklahoma's case against the Defendant Poultry Integrators under state and federal law for the pollution they generate and release within Oklahoma. Further, Peterson's claim that the Compact pre-empts the State's suit goes far beyond the claims of the State of Arkansas – an actual party to the Compact – that the Compact requires the State to exhaust its claims before the Compact Commission before going to Court. *See* State's Response to Peterson Motion to Dismiss, p. 13 fn. 5. This Court should not accept Peterson's invitation to read the Compact in a grander fashion than does either of the actual parties to it.

E. The State's nuisance *per se* claim is sound.

The State has alleged the Defendant Poultry Integrators have committed nuisances *per se* by violating two statutes which prohibit polluting the waters of the state. *See* FAC, ¶ ¶ 103-04 (alleging violations of 27A Okla. Stat. § 2-6-105, which prohibits causing pollution of any waters of the state or placing or causing to be placed any wastes in a location where they are likely to cause pollution, and violations of 2 Okla. Stat. § 2-18.1, which prohibits causing pollution of the air, land or waters of the state by persons subject to the jurisdiction of the ODAFF). Part of the fundamental definition of a nuisance is "unlawfully doing an act" which "endangers the comfort, repose, health, or safety of others" or which "[i]n any way renders other

persons insecure in life, or in the use of property. . . ." 50 Okla. Stat. § 1. Necessarily, violating the two statutes at issue constitutes "unlawfully doing an act" which endangers the health or safety of others or renders the State insecure in its interests in its waters. The arguments set forth in Peterson's Reply pertaining to nuisance per se again ignore the State's allegations. Once it is understood that the State contends that it is the Poultry Integrator Defendants' poultry waste handling and disposal practices that cause pollution that is alleged to be a nuisance *per se*, Peterson's arguments fall flat inasmuch as causing pollution is clearly at all times a nuisance.

It is Peterson, not the State, which engages in "semantical gamesmanship." Reply, p. 11. The best that can be said about Peterson's argument is that Peterson denies violating the statutes at issue. If the State proves the statutory violations, it constitutes nuisance *per se,* while if the State's proof fails, no nuisance *per se* is established. In either event, the answer awaits the proof. For now, it is an adequate nuisance *per se* claim to allege in detail, as the State has done, that the Poultry Integrator Defendants have violated statutes prohibiting pollution of Oklahoma's air, land, or waters. *Branch*, 657 P.2d at 276 (nuisance violating a statute constitutes nuisance *per se* and issue of reasonableness of defendant's conduct and weighing of relative interests of parties is precluded because the Legislature has, in effect, already struck the balance in favor of the innocent party).

Peterson's reliance on *McPherson v. First Presbyterian Church of Woodward*, 248 P. 561 (Okla. 1926), Reply, p. 11-12, does not change the analysis. In *McPherson* two churches claimed a proposed filling station would be a nuisance *per se*. Sensibly, the court held that filling stations are not necessarily nuisances, but may be under certain circumstances. Thus, the judgment of nuisance *per se* was reversed. However, no such distinction can exist in the present case. If the Poultry Integrator Defendants' waste disposal practices pollute Oklahoma's waters

in violation of the statutes as alleged, they are nuisances *per se*.

II. Peterson's Alternative Motion to Stay and reply are without merit.[4]

Peterson once again mischaracterizes the State's case by claiming that the State seeks "to wrest the prerogative of delegation of regulatory authority from the Oklahoma Legislature," and that "[p]laintiffs attempt to encroach upon the plenary power of the Oklahoma Legislature to establish the public policy of Oklahoma to the point of complete usurpation, making the legislative establishment of administrative agencies and their respective jurisdiction a nullity." Stay Reply, p. 2. The State has established in its various responses to motions to dismiss, and in this brief above at page 2, that it is enforcing statutes passed by the Legislature, which is hardly an act of usurpation. What is more, the State has demonstrated that, pursuant to legislative policy enacted in statutes, the Attorney General has the authority to enforce the various agricultural and environmental statutes at issue in this case in keeping with the separate and distinct parallel enforcement mechanisms created by the Legislature. *See* 2 Okla. Stat. § 10-9.11; 27A Okla. Stat. § 2-3-504; 2 Okla. Stat. § 20-26 and 2 Okla. Stat. § 2-16.[5] Acting in this fashion supports, rather than nullifies, the intention of the Legislature.

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[4] Many of these arguments are also addressed in the State of Oklahoma's Supplemental Brief in Opposition to Defendant Cobb-Vantress, Inc.'s Motion to Dismiss Counts 4, 6, 7, 8, 9, and 10 of the First Amended Complaint or Alternatively to Stay the Action, and thus this Supplemental Brief is incorporated by reference herein.

[5] Peterson's citation of 1997 OK AG 95, Stay Reply, p. 4, does not change the plain text of the statutes which authorize this suit and establish the parallel enforcement mechanism found in them. 1997 OK AG 95 ¶¶ 3, 5, n.2, states the ODAFF's jurisdiction over agriculture is not exclusive, and this Opinion did not deal with the parallel statutory enforcement authority of the Attorney General. Peterson mischaracterizes this Opinion. While the State agrees that the ODAFF has ongoing responsibilities and discretionary duties regarding aspects of the management and disposal of waste from the animal industry, nothing in this Opinion mandates the ODAFF to develop "comprehensive plans in the form of TMDLs for nonconforming waters to meet Oklahoma's WQSs."

Peterson's Motion to Stay reply does not contest the State's analysis of the inapplicability of the primary jurisdiction. This analysis demonstrated (1) that parallel enforcement mechanisms had been created by statute, (2) that the factual issues in this case are well within the usual competency of courts to decide, and (3) that the Poultry Integrator Defendants have not shown that any regulatory agency has subjected them to any proceedings or orders whatsoever which might conflict with the remedies sought in this case. Thus, no substantial reason exists for this Court to defer to any administrative agency. *Marshall v. El Paso Natural Gas Co.*, 874 F.2d 1373, 1376-77 (10th Cir. 1989). In the absence of any real and present administrative action before ODAFF to which this Court could defer, Peterson now seems concerned that this action to clean up pollution in Oklahoma's waters will, in some unknown fashion, interfere with the development of water quality standards (WQSs) and total maximum daily load (TMDL) calculations.[6] Stay Reply, p. 2-4. Peterson supports this claim with neither logic nor facts, and mistakes which agency actually develops WQSs. In Oklahoma it is the Oklahoma Water Resources Board which develops WQSs, not ODEQ. However, cleaning up pollution of the IRW caused by Poultry Integrator Defendants' poultry waste disposal practices in no way interferes with development of water quality standards by the OWRB. Indeed, the OWRB has already developed WQSs for the waters of the IRW. Cleaning up the waters of the IRW would certainly help attain those standards. Similarly, reducing the total load of pollutants reaching Lake Tenkiller by eliminating pollution released by the Poultry Integrator Defendants in no way interferes with the State's ability to develop a TMDL.

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[6] The State adopts and incorporates its arguments regarding the role of TMDLs found in its Supplemental Brief in Opposition to "Tyson Foods, Inc.'s Motion to Dismiss Counts 4-10 of the First Amended Complaint."

Behind Peterson's supposed concern for the prerogatives of the Legislature or of regulatory agencies is the ever present hope of the Poultry Integrator Defendants to delay the resolution of this case so they can continue with their improper poultry waste disposal practices as long as possible. Similarly, Peterson and the other Poultry Integrator Defendants seek to shunt this case to any forum which lacks authority to hold them responsible in damages for the injuries they have cause to the waters of the IRW. *See* Stay Reply, p. 4. However, this Court is imminently qualified, and authorized by law, to hear all the claims presented by the State, while no administrative entity is so qualified and authorized.

Referral of the State's statutory claims to the ODAFF makes no sense because it would split up claims which should be considered in a consolidated fashion. The ODAFF has no statutory mandate to decide the State's CERCLA and RCRA actions, or its actions based upon common law nuisance and trespass, or its equitable unjust enrichment claim. In no event could the ODAFF decide these federal, common law, and equitable claims. Only the Court can address all the State's claims in a coherent fashion. Thus the Court should do so without referral of any part of the issues to any other agency.

III. Conclusion

Because neither the motion to dismiss nor the motion to stay proceedings has merit, the Court should deny them and proceed with this case.

Respectfully Submitted,

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